

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

MICHAEL L. ROSS,

Petitioner,

vs.

ROBERT MADSEN, Warden Nebraska  
Penitentiary, and SCOTT R. FRAKES,  
Director Nebraska Department of  
Correctional Services,

Respondents.

**4:18CV3000**

**ORDER UPON  
INITIAL REVIEW**

This matter is before the Court for initial review of Michael L. Ross's ("Ross") Petition for a Writ of Habeas Corpus ("petition") under 28 U.S.C. § 2254 (Filing No. 1). Section 2254 requires the Court to "entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." Under Rule 4 of the Rules Governing § 2254 Cases, the Court must conduct an initial review of the petition and summarily dismiss it "[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief." If the Court does not summarily dismiss the petition, it "must order the respondent to file an answer, motion, or other response within a fixed time, or to take other action the [Court] may order."

On November 19, 2010, a Nebraska jury found Ross guilty of (1) discharging a firearm near a vehicle or building, in violation of Neb. Rev. Stat. § 28-1212.04, (2) using a firearm to commit a felony, in violation of Neb. Rev. Stat. § 28-1205(1)(a) and (c), and (3) being a felon in possession of a firearm, in violation of Neb. Rev. Stat. § 28-1206(1). Ross was sentenced to five to twenty years imprisonment on the first two counts and three to ten years on the third—all to run consecutively. Although Ross initially found

some success on appeal challenging the sufficiency of the evidence against him, the Nebraska Supreme Court ultimately upheld Ross's convictions and sentences. Ross unsuccessfully sought post-conviction relief. Ross is presently confined at the Nebraska State Penitentiary.

On January 3, 2018, Ross petitioned this Court for a writ of habeas corpus. As grounds for his petition, Ross, an African-American male, contends § 28-1212.04, on its face, violates the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. Ross further argues the statute is unconstitutional as applied to him and other African-Americans. In addition, Ross asserts he received ineffective assistance from his trial and appellate counsel in violation of the Sixth and Fourteenth Amendments of the U.S. Constitution because they failed to challenge the constitutionality of § 28-1212.04.

The Court has completed an initial review of Ross's petition and supporting documentation and finds that summary dismissal is not required at this time. In light of the Court's findings,


**IT IS ORDERED:**

1. The Clerk of Court shall serve copies of this order and the petition to the respondents and the Nebraska Attorney General.
2. On or before March 2, 2018, the respondents shall file a response consisting of either an answer to the petition on the merits of the claims and any affirmative defenses in the manner contemplated by Rule 5 of the Rules Governing § 2254 Cases, or a motion for summary judgment pursuant to Federal Rule of Civil Procedure 56. The Clerk of Court shall set a case-management deadline for this date.
3. Whether filing an answer or a motion for summary judgment, the respondents shall file (1) a pleading entitled "Designation of Relevant State Court Records," describing in detail any records relevant to the petition, and (2) copies of all records described in that designation.

4. If Ross determines the respondents' designation is insufficient, he shall have ten days to file a motion specifically requesting additional documents and explaining the reasons the documents are relevant to his claims.
5. Whether the respondents file an answer or a motion for summary judgment, Ross shall file any reply within thirty days after service of the respondents' answer or motion.

Dated this 2nd day of February 2018.

BY THE COURT:

A handwritten signature in black ink, appearing to be "Robert F. Rossiter, Jr.", written over a horizontal line.

Robert F. Rossiter/Jr.  
United States District Judge